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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1940.

ROBERT L. MEYER, Administrator of  
the Estate of AMALIE MEYER, De-  
ceased, ROBERT L. MEYER and  
ALBERT L. MEYER,

Petitioners,

v.

UNITED STATES OF AMERICA,  
Respondent.

✓ ✓  
No. 514 - 515

**PETITION FOR WRIT OF CERTIORARI**  
To the United States Circuit Court of Appeals  
for the Seventh Circuit  
and  
**BRIEF IN SUPPORT THEREOF.**

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**PETITION FOR WRIT OF CERTIORARI**  
**To the United States Circuit Court of Appeals**  
**for the Seventh Circuit.**

To the Honorable Charles Evans Hughes, Chief Justice of  
the Supreme Court of the United States of America,  
and to the Associate Justices of the Supreme Court:

Your petitioners, Robert L. Meyer, administrator of the  
estate of Amalie Meyer, now deceased, and Robert L. Meyer  
and Albert L. Meyer, respectfully show to this Honorable  
Court, that because of the facts hereinafter stated, they  
pray that a writ of certiorari issue out of this court to re-  
view the judgment of the United States Circuit Court of  
Appeals for the Seventh Circuit entered in a certain cause

numbered on the docket of said Court of Appeals as 7148 and 7149, and entitled United States of America v. Amalie Meyer et al., and affirming the judgment of the District Court of the United States for the Southern District of Illinois, Southern Division.

### **OPINIONS BELOW.**

No opinion of said District Court of the United States was filed or entered of record. The opinion of the said Circuit Court of Appeals for the Seventh Circuit is contained in the record volume II, page 1179, and is also reported in the 113 Fed. (2), page 387.

### **JURISDICTION.**

The said judgment of the Circuit Court of Appeals was entered June 12, 1940 (Vol. II, page 1179). A motion for rehearing was filed in said Court of Appeals on the 27th day of June, 1940, and taken under submission (Vol. II, page 1193), and was denied by said Court of Appeals July 23, 1940 (Vol. II, page 1209). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### **BRIEF SUMMARY STATEMENT OF THE MATTER INVOLVED.**

The United States of America filed its petition in the District Court of the United States for the Southern District of Illinois, Southern Division (in which district the land herein involved is located), on June 1, 1937, to acquire by condemnation the **fee-simple title** to a large area, 2,476 acres out of a unit farm of 3,300 acres, owned by your petitioners, situated in the Illinois River valley and in Calhoun

County, Illinois, and stretching for five miles along the right bank of the Illinois River, from a point five miles above the mouth of the Illinois River at its junction with the Mississippi River to a point ten miles above said mouth, for an alleged authorized use, in connection with a dam on the Mississippi River at Alton, Illinois, and distant more than twenty miles below said lands, called "Lock and Dam No. 26"; and alleging therein, that said land has been authorized by Congress to be acquired and condemned in **fee-simple absolute**, and "that it is necessary and **advantageous** to the United States to acquire the unqualified fee-simple title thereto" (R. Vol. I, p. 2), and further alleging that the following Acts of Congress authorize the taking by the United States of America of the **fee-simple title** to petitioners' said lands:

An Act to Facilitate the Prosecution of Works Projected for the Improvement of Rivers and Harbors, approved April 24, 1888 (25 Stat. 94), being Section 591 of Title 33, United States Code Annotated.

An Act Authorizing Condemnation of Land for Sites of Public Buildings and for Other Purposes, approved August 1, 1888 (25 Stat. 357), being Section 257, Title 40, United States Code Annotated.

An Act of Congress, approved the 3rd day of July, 1930 (46 Stat. 918-927), Public Document No. 520, 71st Congress, entitled "An Act Authorizing the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for Other Purposes."

House Document No. 290, 71st Congress, Second Session.

An Act Authorizing the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for other Purposes, Public Document No. 520, approved July 3, 1930, relating to the Mississippi River between the mouth of the Illinois River and Minneapolis and between Grafton, Illinois, and the northern boundary of the City of St. Louis, Missouri, as

amended by an Act of Congress, approved February 24, 1932, being Public Resolution No. 10, 72nd Congress, H. J. Res. 271.

An Act Authorizing the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors and for Other Purposes, approved August 30, 1935, and being House Document No. 409.

An Act of Congress, approved August 2, 1861 (12 Stat. 285), and as amended by an Act of Congress, approved June 22, 1870 (16 Stat. 164), being Section 306 of Title 5, United States Code Annotated.

An Act of Congress, approved March 3, 1875 (18 Stat. 470), and as amended by an Act of Congress, approved March 3, 1911 (36 Stat. 1091), being Section 41 of Title 28, United States Code Annotated.

Your petitioners filed a motion to dismiss this petition on the 4th day of September, 1937 (R. Vol. I, p. 82).

Among the grounds for the dismissal of the petition, was the following:

“These defendants jointly further state, and pray to be permitted to prove and establish by competent evidence, first, upon information and belief, that the Lock and Dam No. 26 is distant more than, to wit, twenty miles below the location of their said land in Calhoun County, Illinois, and, therefore, is not a part of any land that Congress authorized the Secretary of War to condemn **in fee**, and does not, and cannot constitute land which Congress authorized to be condemned **in fee**, and which is, **in good faith**, required for the construction, operation or maintenance of said Lock and Dam at Alton; nor for access thereto, and distant twenty miles from said land in Calhoun County; and that the sole and only right and authority granted by Congress (if any), was to authorize the overflow of said land and formation of a still pool above said dam, and to pay the damage caused by such an overflow, and to take a perpetual **easement** to overflow to the

maximum elevation of said dam at Alton (R. Vol. I, p. 90).

\* \* \* \* \*

“Further these joint defendants, owning and in possession of said tracts of land, as above stated, expressly deny that the Secretary of War is authorized by anyone, or all of the several Acts of Congress stated in said petition, to condemn **in fee simple** any of the lands of these defendants located, as above stated, and more than, to wit, twenty miles above said Lock and Dam No. 26, at Alton, Illinois; and further expressly deny that the Act of Congress, approved July 3, 1930 (46 Statutes 918-927), Public Document No. 520, 71st Congress, entitled ‘An Act authorizing the construction, repair and preservation of certain public works on rivers and harbors,’ authorizing works of improvement to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers in the **Mississippi** River between the mouth of the Illinois River and Minneapolis, and between Grafton, Illinois, and the northern boundary of the City of St. Louis, Missouri, to provide a channel depth of nine feet at low water mark with width suitable for long haul common carrier service, to be prosecuted in accordance with the plans submitted in House Document No. 290, 71st Congress, Second Session, as stated on page 2 of plaintiff’s petition, contains **any** authority whatever, or in any manner authorizes or empowers the Secretary of War to take **in fee**, the lands of these defendants located, to wit, twenty miles above Alton and bordering upon the Illinois River and **not** upon the **Mississippi** River” (R. Vol. I, pp. 91, 92).

Said motion to dismiss further expressly denied that the Secretary of War was authorized by any one, or all of the several Acts of Congress referred to in the petition, to condemn **in fee** any of the lands of these petitioners, and stating that said Acts of Congress limited the title and estate

to be taken in their lands, to a perpetual **easement** to overflow said lands (R. Vol. I, pp. 91, 92, 93).

Petitioners also filed a cross petition for damages to 800 additional acres of adjacent and surrounding lands jointly and similarly owned as part of a unit farm, totaling 3,300 acres, owned by them, not sought to be taken in the condemnation proceedings, but which would be damaged by the permanent use to be made of the portion sought to be taken (R. Vol. I, p. 157).

A hearing was made on this motion to dismiss on January 27, 1939 (R. Vol. I, p. 107). On the same date the Court made and entered an order denying said motion to dismiss, to which defendants excepted (R. Vol. I, p. 129). Later a jury trial was had on the petition for condemnation of the land, and on the petitioners' cross petition for damages to said additional 800 acres, part of the unit farm of 3,300 acres (no answer being required under the Illinois practice in condemnation proceedings), beginning on the 16th day of May, 1939, and ending on the 3rd day of June, 1939 (R. Vol. I, p. 183, to Vol. II, p. 1125). The jury rendered a verdict for the petitioners in the sum of \$66,750.00 (R. Vol. II, p. 1125), upon which judgment was entered on the 14th day of June, 1939 (R. Vol. II, p. 1142), for the taking of the absolute unqualified **fee-simple title** in and to the aforesaid property of 2,476 acres of your petitioners.

Thereafter, on June 6, 1939, your petitioners filed a motion for a new trial (Vol. II, page 1135), containing an assignment of errors, among which was an exception saved by defendants to the Court's charge to the jury, (Vol. II, pages 1012 and 1018) and to that portion of the charge, which in effect stated, that the Government was not liable for any direct damage and injury done to the said remaining surrounding and adjacent 800 acres of land owned by the defendants, caused and occasioned by permanently rais-

ing and holding the natural level of the water of the Illinois River **up to** the ordinary high water mark; and was, therefore, only liable for such direct damages, as might be inflicted upon said land from raising and permanently holding the waters of the Illinois River **above** the high water mark; and that, therefore, it is only for such damages as are caused by the raising of the natural water level **above** high water mark, that the Government must make recompense or reparation; and that the United States may, for the improvement of navigation, permanently raise the natural water level to the ordinary high water mark, without liability to pay compensation therefor. Specific exceptions to said portions of said charge were interposed by the petitioners when said instruction was given the jury (Vol. II, pages 1019, 1020).

Petitioners appealed from said judgment to the United States Circuit Court of Appeals for the Seventh Circuit on August 30, 1939 (Vol. II, page 1154). Among the errors assigned on said appeal were the following:

I.

1. The Acts of Congress pleaded in the petition do not authorize the taking of a **fee-simple title** to the petitioners' land, but, on the contrary, when properly construed and interpreted, specifically provide for the taking of a permanent "flowage easement" only in and to said land.

2. That the trial court erred in instructing the jury and in overruling petitioners' exception to said charge, that the Government was not liable for permanently raising and constantly maintaining the natural level of the waters of the Illinois River **up to** the high water mark, and thereby directly damaging said remaining and surrounding lands of petitioners; and that it was only liable for damages sustained by said land from permanently raising the waters **above** the high water mark.

### **SPECIFICATION OF ERRORS TO BE URGED.**

The Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding that said Acts of Congress authorized the taking of the **fee-simple title** to petitioners' land.

2. In holding that the Government is not liable for direct damage to the adjacent lands of the petitioners occasioned by, and due to permanently raising the waters of the Illinois River **up to** the high water mark, and is only liable for direct damage to said remaining lands due to permanently raising the waters of the Illinois River **beyond** the high water mark.

### **REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.**

#### **I.**

The said Court of Appeals for the Seventh Circuit has, by its decision in this case, probably erroneously decided an important question of Federal law that has not been, but should be, settled by this Court; in that it has established a far-reaching, and probably erroneous decision, involving the property rights of **thousands** of owners of land bordering on the Mississippi River and Illinois River, by its construction and interpretation of the said **general** and **special** Acts of Congress, Federal laws, heretofore enumerated in "the brief summary of the matter involved" which are the alleged basis of Congressional authority for this and many hundreds of similar still pending condemnation suits. And has probably erroneously failed, in construing and interpreting said **general** and said **special** Acts of Congress, to follow the applicable decisions of the Supreme Court, announcing the proper principles of construc-

tion and interpretation, and the proper legal effect to be given to a **general** Federal law, when the subject matter of said **general** law, is in conflict with a subsequently enacted **special** law, which deals with the same subject matter, as announced and laid down by **this Court** in its previous decisions (hereinafter mentioned):

(a) Said Court of Appeals has decided, (Vol. II, pages 1179-1180) and by its decision has probably erroneously interpreted and construed the **general** Act of Congress, approved April 24, 1888, (25 Stat. 94) being Section 591, Title 33, U. S. C. A., (which is entitled "An Act to **facilitate** the prosecution of works projected for the improvement of Rivers and Harbors"), to constitute an unlimited, and **express** grant and delegation by Congress, of its entire legislative discretion, to the Secretary of War; and to empower and grant to said Secretary of War, its entire legislative discretion to select and condemn **any** and all land, and any interest or estate therein, that **he**, the Secretary of War, determines "is necessary," for **this** River and Harbor Project authorized by Congress.

(b) And further decides (under such a construction of said **general** law), that this grant of legislative discretion is not limited by the several subsequent **special** Acts of Congress, which are the sole and only laws that **expressly** authorize **this** particular project; and decides that said **special** Acts authorizing this particular project, contain no limitation or expressions of Congress, showing an **intention** of Congress, to limit the power granted under said **general** law, approved April 24, 1888, and has erroneously decided that the language used, and provisions made, by Congress in said subsequent **special** Acts, whereby it authorized **this** particular project, and put him in motion, is to be deemed a mere "discussion of the legislation providing for the improvement here concerned, between members of Congress, and other Government officials"; and, therefore, said **spe-**

**cial** laws are not to be construed as an expression of **intention** by Congress to limit in any manner the power previously granted by the said **general** Act of April 24, 1888, giving him (as the Court of Appeals holds) unlimited authority to acquire **any** land, or right of way, and to decide whether a "fee-simple title" or a mere "flowage easement" therein is "needed," to enable him to maintain, operate, or prosecute **THIS** particular project; and further decides that in the absence of bad faith, or abuse of that unlimited discretion, such determination **by him** is not subject to judicial review, and is final.

And, therefore, decides that the **special** subsequent and later Act, approved July 3, 1930 (46 Stat. 918, 927), being Public Document No. 520, 71st Congress (which adopts and authorizes the prosecution of the work, "in accordance with the plans and recommendations of the Chief of Engineers, the Board of Engineers of Rivers and Harbors, and the War Department, submitted to Congress in House Document No. 290"), and the provisions of the **special**, subsequent and later Act of Congress, approved February 24, 1932, being Public Resolution No. 10 (which **amends** said above **special** Act of July 3, 1930) and expressly provides:

"That the work shall be prosecuted in accordance with the plan for a comprehensive project to procure a channel of nine-foot depth, submitted in House Document No. 290, 71st Congress, **or** such modifications thereof as **in the discretion of the Chief of Engineers may be advisable**":

And the Act approved July 30, 1935, being House Document No. 409, 74th Congress (which "adopts and authorizes" the prosecution of the work recommended by the Chief of Engineers, and submitted to Congress in House Document No. 137, 72nd Congress), and in House Document No. **184**, 73rd Congress, are **all** to be deemed, "mere discussions between members of Congress and other Government offi-

cials," and not an expression of the **intent** of Congress, and, (Vol. II, page 1180) (as stated in the opinion of said Circuit Court of Appeals),

"do not persuade us, that Congress by said later Acts, intended to limit in any manner the power previously granted to the Secretary of War to acquire the fee-simple title for any authorized purpose when deemed necessary."

Which said Document No. 290 and Public Resolution No. 10 and No. 137 contain the detailed plan of the twenty-six dams authorized to be erected in the **Mississippi** River, between the mouth of the Missouri River and Minneapolis, Minnesota; and said Document No. **184** expressly and separately authorizes the Alton Lock & Dam No. 26, and other dams in the **Illinois** River between Grafton, mouth of the Illinois River, and Chicago.

Said first three documents disclose the **intent** of Congress and what it was requested to adopt, and authorize to be prosecuted in the **Mississippi** River, and contain an estimate of the entire detailed **cost** of the **proposed** project on the Mississippi River, including the detailed **cost** of each area of the land constituting the twenty-six dam **sites**, and of ingress thereto and egress therefrom, and also in minute detail, describe the acreage extent of the area that "will be **overflowed and damaged**" by **each** of the twenty-six dams (due to the still, and permanent pools that will be formed by each said dam); and also contain **in detail** the nature and classification, and kind of lands and property, that will be "damaged" thereby; and the estimated amount that "will have to be paid for **flowage damage**, to the cities, towns and villages, and for bridges, railroads and highways, and other structures, and to agricultural lands, summer resorts, timber and brush lands, for **flowage damages**"; showing also the plans that had been prepared by the Chief of Engineers "to prevent and reduce **damage** to

cities, towns and villages by the erection of protective structures"; and in all such instances the plans "to reinforce or modify such structures to the new condition"; all followed by a tabulation, in which the total areas "to be **overflowed and damaged**" in the various classifications "on which it is assumed flowage damage will be paid, together with **related flowage damages**," are **all** separately stated, for each of the dams in the **Mississippi River**; and under separate items "the total **cost of flowage**, including overhead, surveys, etc., is estimated" (stating the estimated amount); and giving that "**flowage damage**," separately for **each** said dam.

The above proposals and requests **for** authority, as submitted to Congress by the Secretary of War and Chief of Engineers, to prosecute this particular project, together with the recommendations of the Secretary of War, the Chief of Engineers and the Board of Engineers for Rivers and Harbors, disclosing the **entire** scope and estimate of the **entire total cost** of the proposed project in the Mississippi River, from the Missouri River to Minneapolis with the above detail, are all contained in said House Document No. 290, and in said House Document No. 137; and are **separately** enumerated, in minute detail, in House Document No. 184 where the estimated entire and total **cost**, scope, and area proposed to be overflowed by the Alton Pool, in the valley of the Illinois River, by the erection of the **Alton Dam**, are also **specifically** stated, and wherein, at page 53 of paragraph 109 of said Document No. 184 is the following:

"109. **Proposed** pool between Grafton and La Grange—In the estimate of costs it has been assumed that the dam to be built in the Mississippi River at or near Alton will furnish a pool elevation at Grafton of 419 feet above mean sea level. This will eliminate the necessity for building a new lock and dam to replace the existing lock and dam at Kampsville, 31.5 miles

above Grafton. The estimates for this section **include** the cost of **flowage easements** for all lands in the Illinois River Valley, which will be **damaged** by the Alton Pool. Above the present Kampsville Dam the new pool level created by the Alton Dam will be about one foot lower than the present water surface above the Kampsville Dam, so that **no flowage easements are required** between Kampsville and La Grange."

And at page 54, paragraphs 116 and 117, as follows:

"116. Studies were made to develop a plan of improvement which would provide a dependable nine-foot channel without excessive velocities at a reasonable cost from St. Louis upstream to the proposed site of dam No. 25 on the Mississippi River, and to La Grange on the Illinois River. A reasonable cost required that excessive **flowage damages** should be avoided in adopting pool elevations, and that flow heights should not be raised.

"117. It became necessary in the study of the dam located below the confluence of the Illinois and Mississippi Rivers to investigate the question as to whether the manipulation of the discharge gates for the purpose of keeping the proper pool elevation in either river would affect the other river injuriously. The critical condition occurs for a few days in the average year with a minimum flow from the Illinois and a discharge from the Mississippi River at Alton varying from 100,000 to 197,000 cubic feet per second. The latter discharge provides a dependable nine-foot channel depth with open river. At discharges less than 197,000 feet per second, a dam at Alton must maintain a pool level at Grafton of 419 to insure a nine-foot channel depth in the Illinois River to La Grange. It has been ascertained from backwater computations that such level can be maintained by the dam for discharges less than 197,000 cubic feet per second, without causing additional **flowage damage**, since the backwater slopes meet the open river slopes at or below elevation 422, to which **flowage easements are proposed**."

II.

The Court of Appeals also decided (Vol. II, page 1180) that because of its construction and interpretation of said **general** Act of April 24, 1888, as granting unlimited legislative discretion to the Secretary of War, to decide and determine whether it "is necessary" to take the fee-simple title, or merely "flowage easements" in all lands that would be submerged, overflowed and damaged by said Alton Pool, that HIS determination is **final**, and is not subject to judicial review, in the absence of bad faith, or abuse of discretion. And, further:

(a) Decided (Vol. II, pages 1180 and 1181) (notwithstanding the evidence conclusively and uncontradictally showed) (Vol. I, pages 127 to 128), that the **sole** and **only** use to be **actually** made, and that could **possibly** be made, of defendants' property, was to overflow a portion of it; and also showed that it was all separated from the Illinois River, and "fenced off" from the Illinois River, by a public county road, which runs along the bank of said Illinois River, and traverses the lands of the defendants in such a manner, as to render it a **physical impossibility** to even **enter** upon, and have **access** to said land, from said river, without acquiring said county road; (and that said county road is not being condemned, but is expressly excluded from condemnations); and notwithstanding the further conclusively shown fact,—that was not contradicted, (Vol. I, pages 107 to 128), that 500 acres of the 2,476 acres of land sought to be acquired **in fee** from these defendants, is of such an elevation **above** the said pool, as not to be overflowed or submerged **at all** by the pool; and yet, nevertheless, said Court of Appeals decided, probably erroneously, that **such** evidence was not material, and did not constitute proof of an **abuse** of discretion; since the decision of **such** questions rests wholly in said delegated, unlimited, legislative discretion of the Secretary of War,

and his decision is **final**, and is not subject to review by the Court. And further,

(b) That said Court also probably erroneously decided (Vol. II, page 1181) that a certain letter written by the **Chief of Engineers** to James Hamilton Lewis, United States Senator from Illinois (Vol. I, page 98), dated May 3, 1937 (and therefore **one** day prior to the date of the letter of the Secretary of War to the Attorney-General of the United States, dated May 4, 1937 [Vol. I, page 64] requesting that this proceeding be brought to acquire defendants' land in fee), and which letter was offered in evidence **to support** defendants' contention, that said land was not **in good faith** being condemned as "necessary" for navigation purposes, **was held not competent as evidence**, for the purpose of showing the **abuse** of authority, and the **true use** to be made of said land, when acquired; for the reasons stated by the Court (Vol. II, page 1181):

"that it was not written by the official who had the burden of determining the question of necessity, but by a subordinate agent, with whom the Secretary may or may not have agreed";

thereby, probably erroneously, giving no effect whatever, to the said **special** Act of Congress, approved February 24, 1932, and being Public Resolution No. 10 (relied on by the Government as **one** of the Acts of Congress authorizing this project), and wherein it is **expressly** recited, that **this** River and Harbor Project, is authorized to be prosecuted,

"In accordance with the plan for the comprehensive project submitted in House Document No. 290, 71st Congress, Second Session, or such modification thereof **as in the discretion of the Chief of Engineers may be advisable**,"

and excluded, and probably erroneously failed to consider the fact, that **this** letter was written by **that Chief of Engineers**, and discloses his **FRANK ADMISSION** (Vol. I,

page 98), that the defendants' lands were about to be acquired **merely** to be overflowed and **damaged** by the Alton Pool, and will no doubt be desired for the development of parks and recreational facilities and for wild life conservation; and which letter, [coupled with the above evidence, showing the **physical impossibility** of even having access to the land for navigation purposes, and that 500 acres of it are high **above** the elevation of the Alton Pool], established the contention of defendants, pleaded and relied on; that the taking IN FEE is not only not authorized by Congress, but is an ABUSE of **all** discretion (if any was granted to the Secretary of War); and discloses a complete **lack of good faith**; and established, that under the guise and cloak of "needing" said lands in **fee**, for navigation purposes, they were merely to be overflowed, and were intended to be turned over to **other** departments of the Government, to be used in violation of the River and Harbor Law, for wild life refuges, and recreational parks (2,000 acres of said land, being a wonderful and widely known and expensively improved duck-shooting territory; and said 500 acres thereof high above the elevation of said pool and devoted to valuable corn and wheat crops). And, therefore, **none** of it was "needed" in fee for any legitimate river and harbor project; and if it **might** be "advantageous" to acquire said lands **in fee** for "Wild Life Refuges" or "Recreational Parks," or "a site for a future riverside scenic highway," **such** uses were not such as Congress had authorized the Secretary of War **to consider**, in taking land "necessary" to provide a nine-foot channel for navigation purposes; and that **Congress intended to leave the fee** title to all land that had **such** values, to the owners, subject **ONLY** to a perpetual easement to overflow them, upon payment of "**flowage damages**."

(c) The construction and interpretation of the said **general** law of April 24, 1888, and the legal effect to be **properly**

given the said several **special** laws authorizing **this** project, is in **direct** conflict with the principles and rules of construction laid down by the Supreme Court in the well-settled and long-established cases of

Townsend v. Little, 109 U. S. 504;  
Rosecranz v. U. S., 165 U. S. 257;  
Rodgers v. U. S., 185 U. S. 83;  
Washington v. Miller, 235 U. S. 422,

wherein this Court announces, that it is a fundamental rule of construction and interpretation, that when a **general** statute, if standing alone, would include the same matter as the **special Act**, and thus conflict with it, the **special Act** will **always** be considered an exception to the **general** statute \* \* \* and that even when the **general** statute is of a later enactment, the **special Act** will be construed as an exception to its terms.

(d) The instruction excepted to, wherein the District Court announced to the jury (Vol. II, page 1012):

“The United States may, in the improvement of navigation, raise the water to the ordinary high water mark without liability to pay compensation therefor.”

And again announced (Vol. II, page 1018):

“Concerning the question of damages caused by the raising of the water of the river up to the ordinary high water mark, the Government is not liable. However, for damages caused a riparian owner from the raising of the water above the high water mark, it is liable. Therefore, it is only such damages as are caused by the raising of the water levels above high water mark that the Government must make recompense or reparation.”

And which instruction, affirmed and approved by the said Court of Appeals (Vol. II, pages 1190 and 1191), is probably erroneous, and in direct conflict with, and in **total** disregard of the decisions of the Supreme Court of the United

States, wherein it has been finally and conclusively stated "that the liability of the United States under the Fifth Amendment to the Federal Constitution to make just compensation for an appropriation of land for public use, is not defeated, because such land was taken by the Government, in the exercise of its power to improve navigation."

United States v. Lynah, 188 U. S. 445;

United States v. Cress, 243 U. S. 316;

United States v. Grizzard, 219 U. S. 180;

United States v. C. B. & Q. Ry., 82 Fed. (2d) 131  
(C. C. A. for the Eighth Circuit);

United States v. C. B. & Q. Ry. Co., 90 Fed. (2d) 161  
(C. C. A. for the Seventh Circuit).

(Note): The above C. B. & Q. cases **each** involved these very **same** Acts of Congress, under which the Government attempted to take property of the C. B. & Q. Railroad, and to damage the balance on the Mississippi River; and wherein the decision of the **Eighth** Circuit Court of Appeals, 82 Fed. (2d) 131, most exhaustively analyzes the liability of the United States, and likewise the said C. B. & Q. case in the 90 Fed. (2d) 161, is also a most exhaustive analysis by this same Court of Appeals for the Seventh Circuit; and we may add, in both cases, the law announced by the Supreme Court in United States v. Lynah and in the United States v. Cress, and in the United States v. Grizzard was all followed; and the United States **held** liable for all damages inflicted by permanently raising the natural level of the Mississippi River and injuring the **balance** of the railway's properly not taken; and, therefore, the **decision** of **this** instant case, as disclosed in this record at volume II, pages 1190 and 1191, is directly in conflict with the opinion rendered by this **same** said Court of Appeals for the Seventh Circuit in said 90 Fed. (2) 161.

(e) The undisputed and **physical** evidence in this record discloses that this Alton Dam creates and maintains a

permanent pool at an elevation of 421 feet above sea level in the Illinois River bordering defendants' land, and that that level will flood and damage 2,000 acres of the 2,476 acres, attempted to be taken in fee, but will not flood the remaining 476 acres so sought to be taken, which is high above said 421-foot level.

Also that surrounding the said 2,476 acres, (which is carved out of the 3,300-acre **unit** farm of the defendants) are 800 additional acres that lie at an elevation of from 422 to 430 feet above sea level; and that this additional 800 acres not attempted to be taken, will be deprived of surface and subdrainage, by reason of the constant and permanent maintenance of said pool at 421 feet above sea level.

And that prior to the erection of this dam at Alton, the average level of the waters of the Illinois River, for 92 per cent of every year, was but 406 feet above sea level (one could almost wade across the Illinois River 92 per cent of the year), thereby affording a fall, under natural conditions, of fifteen feet for surface and subdrainage; and that by reason of the changed condition, the ground water table under said remaining 800 acres will be permanently raised to 421 feet and there constantly maintained.

And that from four to six feet of unsaturated soil, between the ground water table, and the top crop producing surface, are needed, for root penetration, to grow wheat and corn, which was the valuable use formerly made of said land.

That in consequence, all of said 800 acres varying in elevation between 422 and 430 feet above sea level, has been and will be seriously damaged by the permanent and fixed ground water table under it at the new elevation of 421 feet.

This evidence is uncontradicted, and is contained in the record (Vol. II, 840 to 881 and 939 to 971).

It was at **this** damage to **that** 800 acres, that the Court's instruction, and the exception thereto saved by the defendants, was directed (Vol. II, page 1012, 1018 and page 1019 and 1020).

### III.

#### **The Great Importance of the Questions Involved by This Probably Erroneous Decision.**

The great importance of the questions we are presenting is due to the fact, that this case involved the interpretation of a **general** Federal law that has **not** been interpreted by **this** Court, upon which depend the legal rights of owners of **thousands** of acres of land on both banks of the Mississippi River, from the mouth of the Missouri River to Minneapolis, and likewise in the valley of the Illinois River from Grafton to Chicago; because, **acting** under **such** a construction of said **general** Act of April 24, 1888, said Secretary of War has undertaken to not only take IN FEE the lands of these defendants that are merely partially overflowed by this Alton pool, but has likewise instituted proceedings to take lands IN FEE on both banks of the **Mississippi** River for hundreds of miles between Alton and Minneapolis, and on the **Illinois** River, from Grafton to Chicago, which are **likewise** merely overflowed by the several pools formed by said many dams; and many proceedings are now pending before the Federal Courts in the Districts of Missouri, Illinois, Iowa, Wisconsin and Minnesota, wherein the **above** decision of this said United States Circuit Court of Appeals for the Seventh Circuit, is being used as a precedent, which said District Courts deem themselves required to follow; and involving **thousands** of acres of land merely damaged by said pools, and in which the Secretary of War is seeking the **fee-simple** title, under his contention, that he has **unlimited** legislative discretionary power, to take **any** land which in **his** discretion, is needed,

for said river and harbor improvement; and on information and belief, and particularly in view of the facts disclosed in this instant case, he is demanding a **fee-simple title**, not only to all lands that will be overflowed and be merely **damaged** by said pools, but also to all lands which **he thinks** it would be **advantageous** to the United States to acquire, with the purpose and intent of overflowing portions of them, and turning over the balance, to **other** departments of the Government, for recreational parks, (where they are **above** the level of the pool), and for wild life refuges, where they have long been used for duck-shooting purposes; and that, therefore, a proper construction of the said **general** law and of the said **special** Acts, authorizing **this** huge project, affecting the property of thousands of property owners, **should** be made by this Court, especially in view of the fact that the Act of April 24, 1888 has **never** been so interpreted by **any** Federal Court until this decision was rendered; and in further view of the fact, that the decision made by said Circuit Court of Appeals has **probably** been arrived at erroneously, in failing to give effect to, and to follow the applicable decisions of the Supreme Court of the United States, in construing and interpreting **general** laws, which are in conflict with **special** laws.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, and commanding the said Court to certify and send to this Court, a full and complete transcript of the record, and of the proceedings of the said Circuit Court of Appeals in case numbered 7148-7149, entitled on its docket "The United States of America, Plaintiff-Appellee, v. Amalie Meyer, Robert L. Meyer and Albert L. Meyer, Defendants-Appellants, to the end, that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; that the judgment herein of the said

Circuit Court of Appeals be reversed, and for such further relief as to the Court may seem proper.

Dated October 15th, 1940.

ROBERT L. MEYER,  
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